CHIENG SIEW HUI A

v.

PROMAX ROAD CONSTRUCTION SDN BHD & ORS

HIGH COURT SABAH & SARAWAK, SIBU B
HAMID SULTAN ABU BACKER JC
[PETITION NO: 26-3-2006]
10 SEPTEMBER 2008

COMPANY LAW: *Members' rights - Oppression - Allegation of - Whether proved - Whether second respondent had not honoured his commitment of ensuring petitioner fully registered as shareholder - Whether conduct of persons had de facto control of company attempted to reduce or dilute petitioner's equity in company - Whether plaintiff made out case under s. 181 Companies Act 1965* C

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The petitioner applied under s. 181 of the Companies Act 1965 (CA 1965) seeking, *inter alia*, the following reliefs (a) that the passing of the resolutions for the appointment of directors and the reduction of directors to four be cancelled; (b) that the passing of the resolution for allotment of additional 30,000 ordinary shares each be cancelled and the company be prohibited to issue and allocate any further shares; (c) that the third respondent transfer all her 100,000 shares in the company to the petitioner and the company forthwith register the said 100,000 shares in favour of the petitioner and (d) or alternatively the company be wound up. It was the petitioner's case that he was induced by the second respondent who warranted that he was a majority shareholder and managing director of the company to become a member of the company by buying out from him 300,000 shares out of the 600,000 shares which was issued and paid to the company at a price of RM1.32 per shares. Further, the petitioner alleged that only 200,000 shares of the 300,000 shares were registered in his name and the other 100,000 shares were not registered on the grounds the petitioner had failed to deliver the accompanying shares certificates allegedly handed over by the second respondent. The petitioner denied receiving any share certificate from the second respondent. The petitioner also submitted that by allotting 30,000 additional shares at RM1 each to employees and directors based on the tenure of service was a deliberate attempt to dilute the petitioner's shareholdings in the company. The passing of the resolutions, it was alleged, was a deliberate and oppressive act on the part of second respondent and the rest of his family members to take control of the company. It was also contended that the passing of the resolution to reduce the number of directors to four was again a deliberate attempt and an oppressive act to get the petitioner out of the company.

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Held:

(1) The second respondent who entered into the sale and purchase agreement of the 300,000 shares had not honoured his commitment of ensuring the petitioner was fully registered as a shareholder. From the affidavit evidence, it could not be denied that the second respondent had much say in the affairs of the company but the second respondent's affidavit in attempting to give excuses for not registering the 100,000 shares and in addition allowing the petitioner's equity in the company to be diluted only tended to show that he was not a man of honour and his version in the affidavit was of suspect. The version of the petitioner ought to be accepted. (para 5)

(2) The second respondent lacked commercial probity and deliberately had frustrated the registration of 100,000 shares, for if the 100,000 shares had been registered instantly, the company could not have an Annual General Meeting without the presence of the petitioner for the quorum requirement under cl. 63 of the Articles of Association was 51% of the total amount of the issued capital of the company. As the petitioner had purchased 50% of the equity his presence was essential. If there was no AGM then the issue of appointment of Directors as well as other resolutions by Directors would not have the legal mandate. (para 5)

(3) The petitioner had made out a case under s. 181 of CA 1965. The conduct of the persons who had de facto control of the company had attempted to reduce or dilute the petitioner's equity in the company. It is trite that a member of the company would be able to bring himself within the section if he could show that the value of his shareholding in the company had been seriously diminished or at least seriously jeopardized by reason of a course of conduct on the part of those persons who have *de facto* control of the company. There was oppression on the facts of the instant case. The said oppressive conduct affected the petitioning member qua member. (para 6)

[Order accordingly.]

Case(s) referred to:

Dato' Ting Check Sii v. Datuk Hj Mohamad Tufail Mahmud & Ors [2008] 7 CLJ 315 HC ***(refd)***

Dato' Ting Check Sii v. Galaxy Grip Sdn Bhd & Ors [2007] 1 LNS 432 HC ***(refd)***

Lim Cheng Huat Raymond v. Teoh Siang Teik [1996] 3 SLR 605 ***(refd)***

Low Tien Sang & Sons Holding Sdn Bhd & Ors v. How Kem Chin & Ors [1999] 1 LNS 163 HC ***(refd)***

Ngui-Kee Cooporation (M) Bhd & Anor v. Pan-Pacific Construction Holdings Sdn Bhd [2008] 3 CLJ 335 CA ***(refd)***
Re RA Noble & Sons (clothing) Ltd [1983] BCLC 273 ***(refd)***
Re Ringtower Holding Plc [1989] 5 BCC 82 ***(refd)***
Re Unisoft Group Ltd (No 3) [1994] 1 BCLC 609 ***(refd)***
See Hua Realty Bhd v. See Hua News Holding Sdn Bhd & Ors [2007] 7 CLJ 152 HC ***(refd)***

Legislation referred to:
Companies Act 1965, s. 181

For the petitioner - George Lim; M/s Battenberg & Talma Advocates
For the respondents - Derbe Tang; M/s Chew, Jugah, Wan Ullok & Co Advocates

Reported by Suhainah Wahiduddin

JUDGMENT

Hamid Sultan Abu Backer JC:

[1] This is my judgment in respect of the petitioner's application under s. 181 of Companies Act 1965 (CA 1965) seeking the following reliefs namely: (i) that the passing of the resolutions for the appointment of directors and the reduction of directors to four be cancelled; (ii) that the passing of the resolution for allotment of additional 30,000 ordinary shares of RM1 each be cancelled and the company be prohibited to issue and allocate any further shares; (iii) that the 3rd respondent does transfer all her 100,000 shares of RM1 per share in the company to the petitioner or his nominee and that the company does forthwith register the said 100,000 shares of RM1 per share in favour of the petitioner or his nominee; (iv) that the future affairs of the company be regulated by the court in such manner as it deems fit; (v) alternatively, the 2nd respondent or the other existing shareholders buy over the petitioner's shares in the company at the price of RM1.52 per share or at such price per share as shall be valued or for the petitioner to buy over the shares of Mr. Loh Ing King and the other shareholders; (vi) such other order as the court thinks fit; (vii) alternatively, for the said company to be wound up.

Brief Fact

Failure To Register Shares

[2] The petitioner says: (i) on or about 21 March 2003 petitioner was induced by the 2nd respondent who warranted that he was a majority shareholder of the company as well as the managing director to become a member of the company by buying out from him 300,000 shares out

of the 600,000 shares of RM1 per share which was issued and paid to the company at a price of RM1.32 per shares; (ii) further, the petitioner alleges that only 200,000 shares of the 300,000 shares were registered in his name and the other 100,000 shares were not registered on the grounds the petitioner had failed to deliver the accompanying share certificates allegedly handed over by the 2nd respondent. The petitioner denies receiving the share certificate from the 2nd respondent.

Resolution To The Prejudice Of The Petitioner

(iii) further, by allotting 30,000 additional shares at RM1 each to employees and directors based on the tenure of service was a deliberate attempt to dilute the petitioner's shareholdings in the company. The passing of the resolutions was a deliberate and oppressive act on the part of 2nd respondent and the rest of his family members to take control of the company; (iv) the passing of the resolution to reduce the number of directors to four was again a deliberate attempt and an oppressive act to get petitioner out of the company.

[3] In respect of the failure to transfer the shares, the respondents in the opposing affidavit say that, according to their information, the transfer was not done because the name in the transfer form was not that of the petitioner. In respect of the respective resolutions the respondents say, the majority of members present and voting has both the legal and rightful capacities to vote the way they decided. And asserts that the resolution for the allotment of additional 30,000 ordinary shares of RM1 each was properly passed by the majority members present and voting. Further, the respondents say, for the 3rd respondent to transfer 100,000 shares to the petitioner or his nominee is beyond the scope of s. 181 of the CA 1965. In conclusion, the learned counsel for the respondents submit as follows:

(i) it is wrong for the petitioner to claim to have ownership of 50% of the company's shareholding. This is because the 100,000 shares are yet to be registered in his name and he has acquiesced to this fact that he only owned 200,000 shares by attending the Annual General Meeting of 2006.

(ii) since the resolutions passed at the Annual General Meeting of 30-12-2005 were duly passed by the majority members present and voting, they were valid and should not be interfered with.

(i) transfer of shares are governed by the company of Memorandum and Articles of Association. It is not within the ambit of section 181 to direct any transfer of shares,

(iv) the company is in good shape, properly managed, making relatively good profit and paying dividend. Therefore Management of the company should remains *status quo*.

[4] The respondent relies on the following cases namely: (i) *Dato' Ting Check Sii v. Datuk Hj Mohamad Tufail Mahmud & Ors* [2008] 7 CLJ 315; (ii) *Ngui-Kee Cooporation (M) Bhd. & Anor v. Pan-Pacific Construction Holdings Sdn Bhd* [2008] 3 CLJ 335; (iii) *Low Tien Sang & Sons Holding Sdn Bhd & Ors v. How Kem Chin & Ors* [1999] 1 LNS 163; (iv) *Lim Cheng Huat Raymond v. Teoh Siang Teik* [1996] 3 SLR 605.

Preliminaries

[5] It is important to note in the instant case that the petitioner is not an original shareholder. It can be easily inferred from the agreement of sale of 300,000 shares that he was invited by the 2nd respondent and paid a premium of 0.32 cents per share to control 50% of the equity. The agreement of sale reads as follows:

Agreement

An Agreement is made this 21st day of March 2003 between Loh Ing King (520522-13-5535) of No.57,Green Heights, Kuching (hereinafter called the 'First Party' of the one part And Ciiieng Stew Hut (720113-13-5389) of No. 176,Taman Wawasan, Lorong 13G, Arang Road, Kuching. (Hereinafter called the 'Second Party' of the other part.

Whereas the First Party is a majority shareholder of a company called Promax Road Construction Sdn.bhd., a company registered under the Companies' Act 1965 on 15thJune 1981 and having its registered office at No.38,2nd Floor, Jalan Kampong Nyabor, Sibu (hereinafter called the' Company').The Company has a paid-up capital of 600,000 shares of RM 1.00 each.

Now It Is Hereby Agreed as follows:

1. The First Party is desirous of selling to the Second Party and the Second Party is desirous of buying from the First Party 300,000 shares in the Company at the price of RM 1.32 per share.

2. The First Party shall sell and the Second Party shall buy the 300,000 shares in the following manner:

Date	No. of Shares	Consideration
2.1 Upon signing of the Agreement	100,000	RM132,000.00
2.2 On or before 1st April 2004	100,000	RM132,000.00
2.3 On or before 1st April 2005	100,000	RM132,000.00

The payment for the consideration of RM132,000.00 as stated in 2.1 above shall be in the following manner:

2.1a Upon signing of this agreement	:	RM70,000.00
2.1b On or before the enf of April, May, June, July & August	:	RM10,000.00
2.1c On or before 30th September 2003	:	RM12,000.00

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3. It is Expressed Agreed by both parties that the Company's interest in a parcel of land described as Lot 470, Block 60, Sarikei Land District, Sarikei shall be Excluded in this transaction and that the above-mentioned land shall belong to the First Party.

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4. The First Party shall be responsible for all the accounts payable of the Company, aIl other amounts owed by the Company and costs and charges incurred by the Company before the date of this Agreement.

5. The First Party shall be responsible, at his own costs and C expenses, for the completion of 2 outstanding contracts, namely:

(i) a contract entered into with- Bintulu Landmark Sdn. Bhd. dated 15th August 2002;

(ii) a contract entered into with Brooke Dockyard & Engineering Works Corporation dated 11th March 2000. D

The First Party shall be responsible for any losses incurred or be entitled to any profits generated in respect of these 2 contracts.

6. The First Party shall be entitled to receive all contract fees due from the employers in respect of these 2 contracts and all other E monies due from debtors. Upon completion of the receipts and payments of all liabilities, the Company shall have a NIL bank balance.

7. The Second Party shall be entitled to profits earned by the Company after the date of this Agreement in proportion to his F shareholding.

It is common knowledge that premium for shares are paid based on profitability of the company and also a higher premium is paid for control of equity, etc. This fact must be taken into consideration to G distinguish the cases relied on by the respondents. In addition, it must not be forgotten that the 2nd respondent who entered into the sale and purchase agreement of the 300,000 shares had not honoured his commitment of ensuring the petitioner is fully registered as a shareholder. From the affidavits evidence, it cannot be denied that the 2nd respondent has much say in the affairs of the company but the 2nd H respondent's affidavit in attempting to give excuses for not registering the 100,000 shares and in addition allowing the petitioner's equity in the company to be diluted only tends to show that he is not a man of honour and his version in the affidavit is suspect and the version of the petitioner ought to be accepted. I also take the view that the 2nd I respondent lacks commercial probity and deliberately has frustrated the registration of 100,000 shares, for if the 100,000 shares had been registered instantly, the company cannot have an Annual General

Meeting without the presence of the petitioner for the quorum requirement under cl. 63 of the Articles of Association, is 51% of the total amount of the issued capital of the company. As the petitioner has purchased 50% of the equity his presence is essential. If there is no AGM then the issue of appointment of directors as well as other eesolutions by directors will not have the legal mandate.

[6] I have read the petition, affidavits and exhibits filed herein. I take the view that the petitioner has made out a case under s. 181 of CA 1965. My reasons are as follows:

(i) In this case, it cannot be denied that the petitioner is entitled to 50% of the equity. The conduct of the persons who have *de facto* control of the company have attempted to reduce or dilute the petitioner's equity in the company, and the reason as I have stated earlier is obvious. It is trite that a member of the company would be able to bring himself within the section if he can show that the value of his shareholding in the company has been seriously diminished or at least seriously jeopardised by reason of a course of conduct on the part of those persons who have *de facto* control of the company. I have dealt with this area of law extensively in a number of cases namely: (i) *Dato' Ting Check Sii v. Datuk Hj Mohammad Tufail Mahmud & Anor* [2008] 7 CLJ 315, (ii) *Dato' Ting Check Sii v. Galaxy Grip Sdn Bhd & Ors* [2007] 1 LNS 432, (iii) See *Hua Realty Bhd v. See Hua News Holding Sdn Bhd & Ors* [2007] 7 CLJ 152. I do not wish to repeat the same. In *Re Unisoft Group Ltd (No 3)* [1994] 1 BCLC 609, Harman J said at p. 623:

> ... In my judgment the law is that a shareholder may act with malice in voting his shares against a particular resolution and there can be no objection to 5 that, just as in *Bradford Corp v. Pickles* [1985] AC 587, a landowner acted on his own land with malicious intent to harm his neighbour, but was not in breach of any legal obligation. Of course, if a trustee holds shares on trust, he may have obligations to his beneficiaries which cause him to exercise the rights attached to those shares in the interest of the beneficiaries, but that is nothing whatever to do with an individual's position as a shareholder and his relationship with his co-shareholders.
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> In my judgment, it is vitally important to hold that shareholders' disputes concerning dealings with their shares are not the same as unfair conduct of the company's business. Shareholders must be kept distinct from the company as far as their private position as shareholders is concerned.
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> It is of course obvious that a company may act or conduct itself in a manner affecting a shareholder's rights in respect of his shares, for example the board may refuse to sanction a transfer of shares

A for improper reasons. The action of the board is conduct of the affairs of the company and so, if damage is alleged, may raise the ground of "unfair" prejudice, and a petition under section 459 (of the UK Companies Act 1985) may be presented to the court. Further, a shareholder by exercising his own private right to vote his shares may cause the company to act by the passing of some B resolution in general meeting, in matter alleged to be unfairly prejudicial to some members. Again it is not the act of the shareholder in voting that will found a petition but the result of that act if it produces action, or inaction, the company. In my judgment the vital distinction between acts or conduct of the company and the acts or conduct of the shareholder in his private capacity must C be kept clear. The first type of act will found a petition under section 459; the second type will not.

It is only when a shareholder is affected qua member of the company by the company's action which causes damage that s. 459 comes into operation. There is a clear and important D distinction, in my judgment, to be drawn between actions by shareholders affecting other shareholders directly and actions by the company affecting shareholders. The whole of these paragraphs in the points of claim right on to para. 23 are all, in my view, about shareholders' activities and are none, in my view, about E activities of the company. Upon that basis they raise no cause of action within O. 18 r. 19(a) and they are not proper to be pleaded.

(ii) It is my finding that there is oppression on the facts of the instant case and the said oppressive conduct affects the petitioning member *qua* member. The test is objective ie, whether a reasonable F bystander observing the consequences of their conduct, would regard it as having unfairly prejudiced the petitioner's interest. (see *Re R.A. Noble & Sons (clothing) Ltd* [1983] BCLC 273; *Re Ringtower Holding Plc* [1989] 5 BCC 82).

G **[7]** Section 181 gives wide discretion to the court to spell out the appropriate remedy. On the facts of the case it will not be abhorrent to notions of justice and fair play to make the following orders namely: (i) the resolution for the allotment of additional 30,000 ordinary shares of RM1 each be cancelled; (ii) to direct that the 100,000 shares be registered in the name of the petitioner, or alternatively the company be H wound-up.

[8] I am minded *inter alia*, to make any of the above orders, however, before I do so, I will give an opportunity to the parties to reach a settlement and record a consent order, inclusive of costs, failing which I shall make the said proposed order. The said opportunity is I

given to provide only the minimum remedy justifiable to the actual needs of the occasion unless otherwise warrants to ensure the productivity of the company towards social and economic growth are not hampered. This opportunity will also give the parties concerned to take stock of their positions and pave the way for harmonious relationship between the shareholders for the benefit of the company, failing which I may in the best interest of all parties order winding-up of the company. If a harmonious relationship cannot be achieved by parties through this action, then the only best alternative will be the winding-up order.

I hereby order, the matter be stood down to 3pm for the parties to achieve amicable settlement.

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